SUPREME COURT OF APPEALS OF VIRGINIA.

RINEHART & DENNIS CO., INC., v. MCARTHUR.

Sept. 19, 1918.

[96 S. E. 829.]

1. **Mandamus (§ 1*)—Character of Remedy.**—Mandamus is an extraordinary legal remedy, designed to meet emergencies, and to prevent failure of justice, not as remedy to enforce collection of debts.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 513.]

2. **Mandamus (§ 105*)—Enforcement of Contractual Obligations.**—Mandamus cannot be used to enforce mere contractual obligations, nor, generally, to enforce collection of mere money demand from public officer, if creditor has adequate remedy by action at law.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 517.]

3. **Mandamus (§ 3 (6)*)—Adequate Remedy by Action.**—Remedy by action at law against public officer to enforce collection of money demand is not adequate to prevent issuance of writ of mandamus, where it involves tedious and expensive litigation, suits against third persons, is obsolete and inoperative, and does not afford relief on subject-matter of litigation.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 521.]

4. **Mandamus (§ 3 (6)*)—Remedy by Action—Payment of Money by Officer.**—That a party has a remedy by action on official bond of officer will not bar relief by mandamus to compel such officer to pay over money.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 521.]

5. **Contempt (§ 10*)—Officer of Court—Refusal to Pay Over Money.**—Where money is in hands of officer of court, subject to its order, it is clearly a contempt to refuse to surrender and pay it over as directed by the court, and obedience may be enforced by contempt proceedings involving imprisonment of offender.

[Ed. Note.—For other cases, see 3 Va. W. Va. Enc. Dig. 251.]

6. **Equity (§ 422*)—"Final Decree."**—Decree in equity, because it disposed of whole subject of litigation, including costs, and directed clerk to pay money deposited by defendant to him or to whom he should direct, and also struck case from docket, was a "final decree."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.* For other cases, see 8 Va.-W. Va. Enc. Dig. 190.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

7. Contempt (§ 25*)—Enforcement of Final Decree.—Fact that decree in chancery cause was final did not render court powerless to enforce it by contempt proceedings against its clerk, who was ordered to pay over money; such a procedure not being in cause but beyond cause for enforcement of decree.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 242.]

8. Execution (§ 7*)—Duty to Issue—Decree in Equity and Order in Mandamus Proceedings—"Judgment."—Decree in equity cause ordering clerk to pay over to defendant money deposited by him, and order in mandamus proceeding to compel clerk so to do, held both "judgments" against clerk within Code 1904, § 3557, and it was clerk's duty to issue execution thereon, as required by section 3581.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.* For other cases, see 5 Va.-W. Va. Enc. Dig. 423.]

9. Mandamus (§ 3 (11)*)—Remedy by Contempt Proceedings.—Mandamus was futilely awarded by circuit court against its clerk to compel payment and delivery to defendant in an equity cause of money deposited by him with the clerk, as finally decreed; the remedy by contempt proceedings having been complete and adequate.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 520.]

10. Mandamus (§ 65*)—Ministerial Act.—Circuit court had jurisdiction by mandamus to compel its clerk to do a ministerial act concerning which he had no discretion.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 516.]

11. Mandamus (§ 187 (7)*)—Writ of Error—Questions Reviewable—Petition for Writ of Error.—Objection cannot be made to awarding of writ of mandamus, where it is not mentioned in petition for writ of error.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 551.]

12. Mandamus (§ 187 (7)*)—Writ of Error—Questions Reviewable—Notice by Court Ex Mero Motu.—Where the circuit court had jurisdiction of subject-matter of application for mandamus against its clerk, objection to issuance of mandamus, if available, could not have been noticed by Supreme Court on writ of error ex mero motu.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 551.]

13. Appeal and Error (§ 1027*)—Harmless Error—Irregularities in Proceedings.—Where decision on merits was in favor of defendant in error, he cannot assign irregularities in proceedings as error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 584.]

14. Mandamus (§ 153*)—Parties—Claim by Third Person.—To petition for mandamus, under Code 1904, §§ 3011-3021, it would seem that any defense may be made which shows petitioner is not enti-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

tled to writ, and if defendant is mere custodian of a fund, in which he claims no interest, but claimed in good faith by another, such other may be admitted as party, and the rights of all speedily determined in mandamus proceedings.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 542.]

15. Appeal and Error (§ 842 (1)*)—Review—Decision on Question of Law.—Where no controverted fact was passed on by trial court, but solely a question of law, its judgment is not entitled to weight claimed for it, that it must be affirmed because case must be considered as on demurrer to evidence which was conflicting.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576.]

16. Assignments (§ 55*)—Consideration—Order for Fund as Security.—Where order for fund deposited with clerk of court was given by depositor as security in part for existing debt, it was founded on valuable consideration.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 767.]

17. Assignments (§ 56*)—Consideration—Order for Fund as Security.—Where order for fund deposited with clerk of court was given by depositor as security in part for existing debt, it is immaterial to creditor's rights that it did not know of such order when given; subsequent acceptance relating back.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 768.]

18. Assignments (§ 50 (2)*)—Equitable Assignment of Fund—Order.—Where debtor, having deposited fund with clerk of court, for valuable consideration, and intending to transfer fund, gave written unconditional order therefor to his creditor, delivering it to attorney for himself and creditor, there was valid equitable assignment, irrevocable by debtor.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 762.]

19. Assignments (§ 48*)—Equitable Assignment—Chose in Action.—If owner of chose in action, for valuable consideration, signs and delivers writing whereby he intends to part with ownership, whether to use of assignee or of third person, or to apply proceeds, other than for use and benefit of assignor for specific purpose, it is a valid equitable assignment.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 762.]

20. Assignments (§ 134*)—Equitable Assignment—Presumption of Acceptance.—Assignment of fund in custody of another, given as security for existing debt therefor, founded on valuable consideration, will be presumed to have been accepted.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 768.]

21. Judgment (§ 736*)—Res Judicata—Matter without Issues.—Where record in equity case presented no controversy between de-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

fendant and creditor over fund deposited by defendant with clerk of court, though creditor was party, decree was not res judicata of defendant's right to fund as against creditor. to whom he had given order for it.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 354.]

Error to Circuit Court, Dickenson County.

Application for writ of mandamus by M. T. McArthur against the Clerk of the Circuit Court of Dickenson County, wherein the Clerk interpleaded, under Code 1904, § 2998, and the Rinehart & Dennis Company, Incorporated, came in by petition and claimed the fund in controversy. To review judgment awarding the writ, claimant brings error. Judgment reversed, and direction given to the Clerk of the Circuit Court to pay over the fund in controversy to plaintiff in error.

McNutt & Walker, of Charlottesville, and *Roland E. Chase,* of Clintwood, for plaintiff in error.

Sutherland & Sutherland, of Clintwood, for defendant in error.

BURKS, J. Acting under a decree in the chancery suit of Bucyrus Company against McArthur and others, M. T. McArthur, one of the defendants therein, deposited with the clerk of the court $1,200, to be held by him to abide the future decree of the court. The parties to the litigation settled their differences, and a decree was entered therein directing the clerk to pay the said $1,200 to McArthur, or to whom he might direct, and the case was stricken from the docket. McArthur then demanded the money of the clerk, but he refused to pay it, because it was claimed by the plaintiff in error under an alleged equitable assignment from McArthur. Thereupon McArthur applied to the judge of the circuit court of Dickenson county for a writ of mandamus against the clerk to compel the payment and delivery of the money. Upon a hearing on the merits, the judge awarded the writ, and to that judgment this writ of error was awarded.

[1-3] The writ of mandamus is an extraordinary legal remedy designed to meet emergencies and prevent a failure of justice, and is not designed as a remedy to enforce the collection of debts. Merrill, Man. § 67; High, Ex. Rem. § 341. It cannot be used to enforce mere contractual obligations between private persons; nor, as a general rule, can it be used to enforce the collection of a mere money demand from a public officer if the creditor has a full, adequate, and complete remedy by an ordinary action at law. The question is not whether he has a remedy at law, but is that remedy adequate and complete? The

other remedy is not adequate where it involves tedious and expensive litigation, or suits against third persons, or is obsolete and inoperative, or does not afford relief upon the very subject-matter of litigation. It is not complete where it leaves unperformed the very act the performance of which is sought by the writ. There are also other instances where the remedy at law is not adequate and complete. But where an ordinary action at law will afford the creditor full, adequate, complete, and speedy relief, mandamus as a general rule does not lie. Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907; Richmond Ry. Co. *v.* Brown, 97 Va. 26, 32 S E. 775; Nottoway County *v.* Powell, 95 Va. 635, 29 S. E. 682; Lewis *v.* Whittle, 77 Va. 415; Page *v.* Clopton, 30 Gratt. (71 Va.) 415, and cases cited; 26 Cyc. 168-172; 19 Am. & Eng. Encl. Law (2d Ed.) 748-750; 2 Spelling, Ex. Relief, §§ 1375, 1379.

In Arrington *v.* Van Houton, 44 Ala. 284, a county treasurer having funds in hand refused to pay, on demand, a claim which had been duly allowed and filed, and it was held that mandamus would not lie, as the creditor had a sufficient remedy by action on the treasurer's bond. For a like reason, mandamus was refused in Speed *v.* Cocke, 57 Ala. 209, where a county treasurer had, contrary to law, disregarded the order of registration of a claim and paid claims subsequently registered. In Adair *v.* Hancock Deposit Bank, 107 Ky. 212, 53 S. W. 295, a sheriff failed to pay over the county levy as directed, but mandamus was refused because the party should have exhausted his remedy on the sheriff's official bond. State *v.* Bridgeman, 8 Kan. 459. In Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833, it was said:

"Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to be enforced, and then only when they have no other plain and adequate remedy in the ordinary course of the law, and only then when justice would be likely to be defeated or frustrated unless the writ of mandamus were allowed."

See, also, State *v.* Hannon, 38 Kan. 593, 17 Pac. 185.

It is true that the Kansas cases cited were merely declaratory of the existing law that the "writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." This same statute was adopted in Oklahoma, and that state has followed the Kansas cases. In Steward *v.* Territory, 4 Okl. 707, 46 Pac. 487, a probate judge had collected money by virtue of his office, and it was held that mandamus would not lie to compel the payment of the money into the county treasury, as an ordinary action on the bond of the judge furnished an adequate and complete remedy.

[4] The mere fact that a party has a remedy by an action on the official bond of an officer, however, will not alone bar relief by mandamus. High, Ex. Rem. § 35; 26 Cyc. 172. Such a remedy may be far from adequate and complete. For example, the refusal of a clerk to issue process would give rise to an action for damages on his official bond; but, as the relief is not adequate and complete, mandamus lies. People *v.* Loucks, 28 Cal. 69. So the refusal of an officer to issue a warrant to a creditor, after direction by superiors, may be enforced by mandamus although the creditor had a right of action on the officer's official bond. Amer. Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534. Many other cases will suggest themselves.

In 26 Cyc. 172, it is said:

"But in case of corporations and ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law by mandamus, even though the party has another remedy by action for neglect of duty."

An examination of the cases cited, so far as available, shows that this statement does not apply where the function to be exercised consists in the mere payment of money for which a full, adequate, complete, and speedy remedy is afforded by an ordinary action at law, but is applicable to the doing of some collateral thing. People *v.* Loucks, supra; Cumberland, etc., Tel. Co. *v.* Morgan's, etc., R. Co., 51 La. Ann. 29, 24 South. 803, 72 Am. St. Rep. 442. See, also, note 34 Am. St. Rep. 317. Again, cases may arise where an action on the officer's bond would be a wholly inadequate remedy, as where a successor in office could not properly administer the functions of his office unless the money which belonged to the office was surrendered to the successor together with everything else pertaining to the office. Steward *v.* Territory, supra.

[5] In Kidd *v.* Va. Deposit Co., 113 Va. 612, 75 S. E. 145, it was held that:

"Imprisonment for debt passed away in this state with the abolition of the capias ad satisfaciendum in 1849, and, in a proceeding for contempt, where the contempt is not established, it is error to seek to enforce the return of money improperly paid, by an order directing the imprisonment of the defendant if the money be not paid."

It will be observed that, in that case, the contempt was not established. It may be assumed for the purposes of this case that, in this state, a personal decree merely for the payment of money, in a suit by one private person against another, cannot be enforced by imprisonment, in the absence of any question of contempt. But where money is in the hands of an officer of

the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer. 9 Cyc. 10, and cases cited. Clearly, then, the order in the chancery cause directing the clerk to pay over the money to the defendant in error could have been enforced by contempt proceedings, unless there is something in the suggestion that the decree was a final decree in that cause.

[6-12] There can be no question that the decree in the Bucyrus case was a final decree. It disposed of the whole subject of litigation, including the costs, directed the clerk to pay the money in controversy to McArthur, or to whom he should direct, and struck the case from the docket. Rawlings *v.* Rawlings, 75 Va. 76. But the fact that the decree was final did not render the court powerless to enforce it by contempt proceedings. Had the fact that the clerk refused to pay the money been reported to the court, it could, and doubtless would, have proceeded against him for contempt. Such a procedure would not have been a procedure in the cause, which was ended, but a procedure beyond the cause for the enforcement of the decree. Cocke *v.* Gilpin, 1 Rob. 20, 28. As said by Judge Brooke, in the last-mentioned case:

"All decrees must be enforced by attachment when any party is in contempt of the court, and this necessity is most frequent in cases of final decrees."

Even in criminal cases, an order may be entered for the enforcement of the judgment, though the judgment be final and the penalty death. In Nicholas *v.* Commonwealth, 91 Va. 813, 815, 22 S. E. 507, 508, it is said:

"There would be a strange lack of vitality in a court if it could not cause to be enforced by execution a valid and live judgment which it had rendered."

No mandamus, therefore, was necessary to secure the enforcement of the decree.

The futility of the proceeding by mandamus is demonstrated by a comparison of the decree entered in the chancery cause with the order made in the mandamus proceeding. The decree directed:

"That the money deposited by the said M. T. McArthur with the clerk of this court may be released, and the clerk is directed to pay the same immediately to the said M. T. McArthur, or to whomsoever he may direct the same to be paid."

By the judgment:

"It is ordered that F. B. Chase, clerk, be and he is hereby directed and enjoined, immediately after the receipt of this or-

der, or service of a copy of the same on him, to pay the said sum of $1,200 to said M. T. McArthur, or to whomsoever he may direct."

It is difficult to discover any substantial difference between the decree and the judgment. Each was equally a judgment against the clerk, within the provisions of section 3557 of the Code (1904), declaring that:

"A decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property or money, and be embraced by the word 'judgment' where used in any chapter under this title."

And it was the duty of the clerk to issue execution thereon as required by section 3581 of the Code. The mandamus therefore did not afford, and could not have afforded, any greater relief than the petitioner should have obtained by applying for contempt proceedings; but as the trial court had jurisdiction by mandamus to compel its officer to do a merely ministerial act, concerning which he had no discretion, the proceeding by mandamus was not per se either void or voidable, and as no objection was raised to it in the trial court, by demurrer or otherwise, its award is not assignable error here. Nor can objection be made now to the awarding of the mandamus for the further reason that it is not mentioned in the petition for the writ of error. Sands *v.* Stagg, 105 Va. 444, 452, 52 S. E. 633, 54 S. E. 21, and cases cited; and, as the trial court had jurisdiction of the subject-matter, objection to the mandamus, if available, could not have been noticed by the court ex mero motu. Burks, Pl. & Pr. § 205; South & W. R. Co. *v.* Commonwealth, 104 Va. 314, 51 S. E. 824; Hanger *v.* Commonwealth, 107 Va. 872, 60 S. E. 67.

[13] The proceedings in the circuit court were irregular, and led to confusion in the trial of the question involved; but, as the decision on the merits was in favor of the defendant in error, he cannot assign these irregularities as error. This court does not sit to correct all irregularities that may occur on the trial of a cause, but only such errors and irregularities as are prejudicial to the substantial rights of the party assigning them.

[14] The defendant in error filed his petition for a mandamus against the clerk. The clerk answered, disclaiming any interest in the fund, and offering to bring the money into court for its disposition, but alleging that the fund was claimed by the plaintiff in error as assignee of the defendant in error, and asking that his "answer may be treated as an interpleader." On exception to this answer, the court refused to accept it as an answer to the petition, but accepted it as a statutory inter-

pleader under section 2998, and allowed the plaintiff in error to come in by petition and assert its claim to the fund. Even if it be conceded that section 2998 applies to a petition for a mandamus, the answer of the clerk did not comply with the requirements of that section, and the circuit court erred in directing it "to be treated as an interpleader." There was no reason, however, why the answer should not have been treated as an answer to the petition for the mandamus. The proceeding at common law on an application for a mandamus was very tedious and dilatory. It is set forth with great accuracy and fullness in the opinion of this court delivered by Judge Edward C. Burks in Page *v.* Clopton, 30 Gratt. (71 Va.) 415. The same distinguished judge was afterwards one of the revisors of the statute law of the state, and in an address before the Bar Association of the state in July, 1891, he had this to say on the subject:

"The proceedings at common law in mandamus and prohibition were very dilatory, and complicated. Former statutes concerning these writs, while making some improvements, were very inadequate. They were omitted in the revision, and an entirely new procedure substituted, which would seem to be clear, simple, and expeditious." Burks' Address, p. 23.

Under this new procedure, to be found in chapter 144 of the Code, the applicant files a petition, "verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application, a reasonable time before such application is made." If defense is made, it is provided that "such defense may be by demurrer, or answer on oath, to the petition, or by both." Code, § 3014. The judge of the court is given large vacation powers, and ample provision is made for a jury trial, if either party demands it. It is not stated what defenses may be made by answer, but it would seem that any defense may be made which shows that the petitioner is not entitled to the writ prayed for. If, as in the instant case, the defendant is the mere custodian of a fund, in which he claims no interest, but which is in good faith claimed by another, we can see no good reason, under the liberal provisions of the new procedure, why he should not be admitted as a party, and the rights of the parties thus speedily determined in the mandamus proceeding. The error of the circuit court therefore consisted in treating the answer of the clerk as an interpleader instead of as an answer to the petition, but the result was the same; the chief difference being that the judge had vacation powers in mandamus which are not given to him in interpleader.

[15] It is urged upon us that this case is to be considered

as upon a demurrer to the evidence, that the evidence is conflicting, and therefore the judgment of the trial court must be affirmed. It is immaterial whether the case be heard as on a demurrer to the evidence or otherwise. There is no conflict of evidence on the question of the giving of the order to Rouse to pay the money to Rinehart & Dennis Company. McArthur admits that he gave the order. The controversy is over the effect of that order. The trial court did not pass on the validity or effect of the order, or on the state of accounts between the parties, but rested its conclusion solely on the defense of res judicata, which will be noticed later. No controverted fact was passed on by the trial court, but solely a question of law. Under such circumstances, the judgment of the trial court is not entitled to the weight claimed for it.

We shall now consider the effect of said order. McArthur had deposited the money with the clerk through the medium of his counsel, W. H. Rouse, and thinking it would come back to him, when released, through the same channel, as Rouse testifies, he gave a written direction to Rouse as follows:

"Bramwell, W. Va. 10/15/15.

"Mr. W. H. Rouse, Clintwood, Va.—Dear Sir: When the twelve hundred dollars I have deposited with the Dickenson County Court in lieu of bond is of no further service in the Bucyrus case, as security, please pay this amount to the order of Rinehart & Dennis Company, Charlottesville, Va.

Yours very truly,

"[Signed] M. T. McArthur."

This order was inclosed in a letter to Rouse, in which McArthur says:

"In other words, when this money is ready to be turned over to me by the court, it is to be sent to Rinehart & Dennis Company instead, but it is to remain with the court so long as it is any way necessary."

The intention of McArthur, at the time he gave this written direction to Rouse, is clearly disclosed by his cross-examination as a witness in this cause, as follows:

"Q. Mr. McArthur, was it your intention at the time you gave the order that the money should be paid to the Rinehart & Dennis Company? A. Yes.

"Q. At that time you had no other intention but to pay them? A. No, sir.

"Q. You signed the order? A. I did not sign it.

"Q. You parted with the ownership of the $1,200, and it was to be paid to Rinehart & Dennis Company? A. Yes, sir; it was my intention for Rinehart & Dennis Company to get that money."

McArthur afterwards by letter to W. H. Rouse, dated August 31, 1917, attempted to rescind the order. This letter is as follows:

"Tams, W. Va., 8/31/17.

"Mr. W. H. Rouse, Clintwood, Va.—Dear Sir: I hereby rescind the order for $1,200.00, given you some time ago in favor of Rinehart & Dennis Company. We are to have a settlement for work done by M. T. McArthur & Co., Dickenson county, and I do not want this money paid them. Shall ask that you have the clerk of the court forward it to J. R. Simmonds, Johnson City, Tenn.

"Yours very truly, M. T. McArthur."

At the time this order was given, McArthur was personally indebted to Rinehart & Dennis Company in the sum of $2,500, for a note paid for him, and the latter firm also claimed a large sum of the firm of M. T. McArthur & Co. The note has since been reduced by payments to about $940, and McArthur claims that upon a fair settlement he does not now owe Rinehart & Dennis Company anything on the note or otherwise, and that, on the contrary, they are indebted to him.

[16, 17] The order was given as a security, in part, for an existing debt. It was therefore founded upon a valuable consideration, and it is immaterial that the beneficiary did not know of it, when given. The subsequent acceptance of it related back to the time it was given. Evans, Trustee, *v.* Greenhow, 15 Gratt. (56 Va.) 153. In fact, however, the order to Rouse was requested by letter from Rinehart & Dennis Company, dated October 11, 1915, and was actually given October 15, 1915, and was accepted not later than October 30, 1915. This order thus given and accepted McArthur subsequently, on August 31, 1917, attempted to revoke by a letter to Rouse whom he discharged as counsel, and he now claims that the fund belongs to him.

[18, 19] While the $1,200 was on deposit with the clerk, McArthur gave the order hereinbefore recited to Rouse, who was counsel both for him and for Rinehart & Dennis Company. This order, as we have seen, was supported by a valuable consideration, and McArthur intended by it to transfer the fund to Rinehart & Dennis Company. There is no dispute as to these facts, and Rinehart & Dennis Company claim that this constituted a valid equitable assignment of the fund, which was irrevocable by McArthur. This claim, we think, is well founded. Equity looks at the substance of a transaction, and not its mere form. No particular form of words is necessary to constitute a valid assignment in equity of a chose in action. The intention of the assignor is the controlling consideration. If the

owner of a chose in action, for a valuable consideration, signs and delivers a writing whereby he intends to part with his ownership, whether it be to the use of the assignee or of a third person, or to apply the proceeds to a specific purpose other than for the use and benefit of the assignor, it is a valid equitable assignment, regardless of the particular language used. It is sufficient if the debtor would be protected in making payment thereon. Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871; Harlow *v.* Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346; Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Canterbury *v.* Marengo Abstract Co., 166 Ala. 231, 52 South. 388, 139 Am. St. Rep. 30; 2 R. C. L. § 21, and cases cited. It is immaterial that Rouse was acting in the capacity of attorney and agent of both McArthur and Rinehart & Dennis Company. The writing was signed by McArthur himself, and it was the duty of Rouse, under the terms of the assignment, to collect the money and "pay this amount to the order of Rinehart & Dennis Company." Smith *v.* Lamberts, 7 Gratt. (48 Va.) 138. The undisputed evidence in the case measures up fully to these requirements. The case of Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596; has been cited for the defendant in error to show that the writing in controversy does not measure up to the requirements of an equitable assignment. We do not so construe that decision. The holding in that case is well set forth in paragraph 3 of the syllabus as follows:

"The mere promise of the assignee of a fund not in hand that he will, when and as he receives the fund, pay a debt of the assignor, does not give an equitable lien on the fund, nor operate as an equitable assignment thereof. To constitute an equitable assignment, there must be an assignment of the fund or some definite portion thereof, or an order on the person owing the money to the drawer, or holding funds belonging to him, so that the person owing the debt, or holding the fund on which the order is drawn, can safely pay the order, and is compellable to do so, though forbidden by the drawer."

In that case Patterson, a contractor for work to be done for the city of Roanoke, conveyed all funds coming to him from the city to a trust company, and the latter promised the Roanoke Brick Company that it would pay, until further notice, for bricks furnished to Patterson as and when the money therefor was received by it from the city. All that was decided on this point was that this promise of the trust company did not constitute an equitable assignment of any part of the funds in the hands of the trust company. The reasons for the conclusion reached are well expressed by Riely, J., as follows:

"Patterson gave no order to the brick company on the city of

Roanoke, which was to become his debtor for the construction of the sewers, for the latter to pay to the former for the brick it furnished to him. He did not assign or transfer to it for such purpose any part of the fund thus to become due to him. The agreement, upon which it relies for the creation of an equitable lien in its favor on the said fund, is a mere agreement and promise by the Fidelity Loan & Trust Company to pay, when and as it collects from the city the money it would owe Patterson. This did not operate as an equitable assignment. It gave to the brick company no control of the fund, and the company acquired no lien on it; and, further, the condition upon which the Fidelity Loan & Trust Company agreed to pay to the brick company never has been, and now never can be, fulfilled. It only promised to pay out of the fund now in controversy when it received it. The assignment having been annulled, its authority to collect or receive the money coming to Patterson from the city of Roanoke was thereby terminated. The city could not thereafter pay the money to it, and it had no longer any right to receive it. The money never came to its hands, and the occasion when it was to pay the brick company has never arisen, and never can arise."

[20] In the instant case the facts are entirely different. The order is given directly to McArthur himself, and he dedicates the entire fund to a particular purpose. He states explicitly that it was his intention at the time the order was given that the money should be paid to Rinehart & Dennis Company; that he parted with the ownership of the $1,200 and intended that Rinehart and Dennis Company should get it. Upon principle, and upon the authorities cited, such dedication constituted a valid equitable assignment of the fund, although the order was directed to Rouse, the attorney of both parties, and who was expected to collect the fund, and not to the clerk who had actual custody of it. The assignment, being a security for an existing debt, was founded on a valuable consideration, and its acceptance will be presumed until the contrary appears. Evans, Trustee, *v.* Greenhow, 15 Gratt. (56 Va.) 153, 156. Such an assignment is irrevocable by the assignor.

It has been earnestly insisted that the language used in the order renders the assignment conditional, and that in order to constitute a valid equitable assignment "the order must be unconditional." There was no condition about the order in question. It transferred unconditionally all interest of the assignor in the fund, and he testifies that such was his intention. The most that can be made out of the language used in the order is that the fund was or might be subject to a prior claim in the Bucyrus case. So far as the assignor was concerned, it trans-

ferred absolutely and unconditionally all interest he had in it. This was sufficient. We do not mean to concede, however, that a conditional order is not sufficient, if the condition is subsequently fulfilled before the rights of the parties have been in any way altered, as in the case at bar. It is unnecessary to pass upon that question, and we express no opinion upon it.

[21] Finally, it is said that the decree in the Bucyrus case renders the matter in controversy res judicata, as the order to Rouse was given nearly two years before that decree was entered and both Rouse and Rinehart & Dennis Company were parties to that suit. This cannot be true. What is not within the pleadings cannot be adjudged. Courts cannot go outside the record and decide issues not made by the pleadings. The record in the Bucyrus case presented no controversy between the plaintiff in error and the defendant in error over the fund in dispute, so far as is disclosed by the record in this case, and the decree directing the clerk to pay the money to the defendant in error left the rights of these parties inter sese just where it found them. Tarter *v.* Wilson, 95 Va. 19, 27 S. E. 818; Kelly *v.* Hamlen, 98 Va. 383, 36 S. E. 491. For cases in other jurisdictions, see 24 Am. & Eng. Enc. Law (2d Ed.) 775.

It is stated in the brief for the defendant in error that the decree directing the fund to be paid to the defendant in error was entered by consent, but we are unable to verify that statement from the record in this cause.

For the reasons hereinbefore given, the judgment of the circuit court must be reversed, and this court, proceeding to enter such judgment as the circuit court should have entered, will direct the clerk of the circuit court of Dickenson county to pay over the fund in controversy to the plaintiff in error.

Reversed.

SIMS, J. I concur in the opinion delivered by Judge BURKS. I wish, however, to add the following:

I think that if the note of McArthur in favor of Rinehart & Dennis Company, Incorporated, for $2,500, which, to the extent of $1,200, was the consideration which supported the equitable assignment involved in the case, and which consideration existed at the time such assignment was made, had been paid and satisfied in full before the $1,200 covered by said assignment became payable, then, in equity, McArthur would have had the right thereupon or thereafter to revoke said assignment; for the assignment was executory until the money payable thereunder was in fact paid to the assignee, and it was essential to the continued validity of the assignment, after the attempted revocation thereof by his assignor, that the original valuable consid-

eration therefor should have continued to exist at the time the assignee demanded the payment of the money thereunder.

On the question as to whether said consideration continued to exist at the time the assignee, Rinehart & Dennis Company, Incorporated, demanded the payment of the money thereunder, the record presents the following situation:

The testimony for said assignee is distinct and positive that such consideration so continued to exist, and that a further indebtedness, indeed, existed of McArthur to such assignee, to the aggregate amount of some $30,000. This testimony was not given ore tenus before the court below, but by depositions duly taken elsewhere and read before the court on the hearing of the case.

The testimony of McArthur was given ore tenus before the court below and on the subject under consideration, and while he testified that he had after giving said assignment and before his attempted revocation of it, paid on said $2,500 note and reduced the principal thereof to "nine hundred and forty odd dollars," he admitted that the balance still left unpaid and owing thereon "with the interest, might bring it into the neighborhood of $1,100 or $1,200." There is therefore no real conflict between the evidence for said assignor and said assignee as to the continued existence of the original consideration for said assignment to the extent of said $1,200 thereof at the time the payment of the money thereunder was demanded by the assignee.

The only conflict between the testimony for said assignee and that of said assignor with respect to the indebtedness of the latter to the former is this: The testimony for the assignor is, as aforesaid, that McArthur owed them a total amount of some $30,000, as of the time the depositions aforesaid were taken, to wit, on November 2, 1917. Whereas McArthur, testifying on November 17, 1917, as aforesaid, stated, in substance, that he owed said assignee only about $1,200, the balance on said note as aforesaid; that that was the only debt he owed said assignee as he supposed (as "I suppose," to use the language of the witness); and that if there was any other indebtedness to such assignee it was not an indebtedness of his, but "if it is" (an indebtedness of) "anybody it is M. T. McArthur & Co." (to again use the language of the witness). M. T. McArthur & Co. was a partnership in which the witness claimed to have an interest. McArthur admits that in May, 1914, M. T. McArthur & Co. owed Rinehart & Dennis Company, Incorporated, $32,000, according to a statement then rendered by the latter. He testified that there were subsequent transactions between M. T. McArthur & Co. and Rinehart & Dennis Company, Incor-

porated, of which he had never been able to get the latter to render a statement of account; that consequently he had employed counsel to bring suit against the latter in a federal court; and that this was the reason he gave the order of attempted revocation of said assignment. As to how the accounts between M. T. McArthur & Co. and Rinehart & Dennis Company, Incorporated, in fact stood or stand, if accurately settled, no sufficient evidence is furnished by McArthur, by his own testimony or otherwise, to enable the court below or this court to determine. He does not, indeed, appear to definitely claim that he knows that there would be a balance found due M. T. McArthur & Co., upon such a settlement, in which his interest would be sufficient to cover or amount to a set-off against said $1,200 balance of individual indebtedness of his to Rinehart & Dennis Company, Incorporated. The most that can be said of his testimony is that he had employed counsel to institute suit to obtain such a settlement of accounts between M. T. McArthur & Co. and Rinehart & Dennis Company, Incorporated, and that he will claim in such suit that the latter would be found upon such settlement to owe the former to a sufficient amount to give rise to such set-off. McArthur, by counsel, declined indeed to go into the question of fact in this suit of how such account stands; the position of such counsel being (as stated in the record) that he objected to certain questions on this subject addressed to McArthur by opposing counsel, "* * * because it is immaterial whether they" (Rinehart & Dennis Company, Incorporated) "owe McArthur or McArthur owes them, because if there is a bona fide claim that is sufficient in that case, just so there is a bona fide belief, and it is none of the court's business at this time."

Therefore it cannot be said that such testimony of McArthur, although heard ore tenus by the court below, and although full credence were given to it, is sufficient to show that said original consideration to the extent of $1,200 indebtedness from McArthur to Rinehart & Dennis Company, Incorporated, had been extinguished by the set-off aforesaid and no longer existed at the time the payment of said order was demanded by the latter. Nor does it appear from the record that the court below so found as a matter of fact. On the contrary, as pointed out in the majority opinion, the honorable trial judge placed his ruling upon another ground.

For the foregoing reasons, in addition to those set forth in the opinion of Judge BURKS, I am of opinion to reverse the judgment of the court below and to enter judgment for the said assignee.

Note.

Equitable Assignments—Revocability.—The majority opinion by Judge Burks in the principal case merely approved the claim of the appellant that a written order for the future payment of a specified fund when founded on a valuable consideration constituted a valid equitable assignment of the fund which was irrevocable.

In Judge Sims' concurring opinion the point was made that the assignment was executory and that if the consideration therefor was shown to be a certain debt evidenced by note the assignor would have a right to revoke the assignment upon payment and satisfaction in full of the note before the fund covered by the assignment became payable under the terms thereof, and that after an attempted revocation in writing by the assignor it was essential to the continued validity of the assignment that the original valuable consideration therefor should continue to exist until the time when fund in controversy was payable to the assignee. This interesting question was not essential to the decision, however, as Judge Sims concurred in the judgment directing payment of the fund to the assignee on the ground that the evidence did not show that the debt constituting the consideration for the assignment had been paid or extinguished by a claimed set-off, and there was evidence that it continued to exist and that there were other debts between the parties.

An order for value on the holder of a fund appropriating the whole fund to a third person operates as an equitable assignment of such fund to the payee named. Chesapeake Classified Bldg. Assoc. *v.* Coleman, 94 Va. 433, 26 S. E. 843; Switzer *v.* Noffsinger, 82 Va. 518. See cases collected in 1 Va.-W. Va. Enc. Dig. 762.

Immediate payment of the fund to the payee need not be ordered. Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

Ordinarily delivery of an order to pay out funds to one's own agent is not an equitable assignment because the drawer retains control of the matter. Thus where the payment was conditioned on the absence of the drawer at the time appointed for payment it was held that the drawer had not parted with control and there was no equitable assignment and the power was extinguished by the drawer's death. Clayton *v.* Fawcett's Admr., 2 Leigh (29 Va.) 19, as explained in Brooks *v.* Hatch, 6 Leigh (33 Va.) 543.

A power of attorney for consideration to collect a debt or fund due the assignor will operate between the parties as a valid equitable assignment of the debt or fund where such power is intended as a transfer of the fund. Hawes *v.* Wm. R. Trigg Co., 110 Va. 165, 65 S. E. 538.

An equitable assignment must always be supported by a valuable consideration. Perkins *v.* Parker, 1 Mass. 117; Tallman *v.* Hoey, 89 N. Y. (144 Sickels) 537, 539; Kennedy *v.* Ware, 1 Pa. 445, 450, 44 Am. Dec. 145. Thus in Beers *v.* Spooner, 9 Leigh (36 Va.) 153, a direction by one not bound for a debt to his attorney to pay such debt out of collections by the attorney was held revoked by the client's death, the appropriation being without consideration.

In Smith's Admr. *v.* Lamberts, 7 Gratt. (48 Va.) 138, 148, 149, where an attorney had obtained a judgment for a client against the latter's debtor and the debtor placed a note of a third person in the hands of the attorney under an agreement that the latter would collect the note, deduct fee, writ tax and commission, and apply the balance to payment of the judgment, it was held that the transaction constituted an irrevocable appropriation of the proceeds of the

note to the payment of the judgment, and the fact that the attorney in the transaction acted as attorney or agent for both creditor and debtor was held immaterial.

In Burn *v.* Carvalho, 4 My. & Cr. 693, 41 Eng. Reprint 265, 270, the assignor sent a letter to the assignee promising to direct the assignor's agent at a foreign port to deliver certain goods to the assignee's agent at that port. This was duly followed by a letter to his agent directing such delivery of the goods. A commission of Bankruptcy issued against the assignor for an act of bankruptcy committed before the agent received the letter directing him to transfer the goods but after the assignee had received the letter promising such transfer. The goods were delivered after the act of bankruptcy and after the commission of bankruptcy had issued. It was contended that the goods were in the hands of the assignor's agent and hence subject to his order and disposition at the time of his bankruptcy and hence passed to his assignees in bankruptcy. It was stipulated that there was no possibility of informing the assignor's agent of the equitable assignment before the act of bankruptcy. The equitable assignee, however, knew of and accepted the transfer before the act of bankruptcy was committed. Under these circumstances Lord Chancellor Cottenham held that the equitable assignment was valid against the claim of the assignee in bankruptcy. This introduces a qualification of the rule as to an order on one's agent to the effect that if an order has been made known to the assignee by or on behalf of the assignor it may operate as an equitable assignment despite the relationship of principal and agent between the assignor and fund-holder and the resulting control of the subject-matter by the assignor.

In the principal case the assignment was accepted by the assignee before the attempted revocation. The attorney to whom the order was sent was attorney for both assignor and assignee (which was held immaterial in Smith's Adm'r *v.* Lamberts, 7 Gratt. (48 Va.) 138) and it appeared in evidence that the order was requested by the assignee by letter dated Oct. 11, 1915, was given by letter dated Oct. 15, 1915, was accepted by the assignee not later than Oct. 30, 1915, and was not attempted to be revoked until Aug. 31, 1917.

A completed legal assignment is irrevocable by the assignor. Block *v.* Walker, 2 Ark. 4; Barlow *v.* Lande (Cal. App.), 147 Pac. 231, 233, and cases cited. An equitable assignment is also irrevocable by the assignor. Brooks *v.* Hatch, 6 Leigh (33 Va.) 543. As already stated, an equitable assignment will not be enforced unless supported by consideration, but the assignment in the principal case was clearly supported by consideration, viz., payment of a debt. See Brooks *v.* Hatch, 6 Leigh (33 Va.) 543, wherein Tucker, P., said: "When it is clear that the order or power over the fund is given for satisfaction of a debt or for value, it is inferred that a transfer was intended; the transaction is looked upon and treated as a contract; it is irrevocable; and thus constitutes a complete equitable assignment." And in Albert *v.* Albert, 12 Cal. App. 268, 107 Pac. 156, it was specifically held that an assignor could not revoke a completed assignment for failure of consideration. An equitable assignment with power to collect an account given as security for goods was held irrevocable in Curtis *v.* Walpole Fire, etc., Co., 218 Fed. 145, 134 C. C. A. 140. See also Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836, in which it was held that an assignment of the rent due under a lease, by power of attorney to collect same and apply it to a

mortgage, was a power coupled with an interest and hence was not revoked by the death of the assignor.

The assignment in the principal case was practically a power of attorney to collect and apply the fund involved. The Michigan decision cited is certainly a stronger case than a mere attempted revocation by a living assignor and under the general rule that an equitable assignment upon consideration is irrevocable and the California decision that failure of consideration is no ground for revocation, it would seem that the assignment in the principal case, being a payment of a debt and not a mere security for one, would not be affected by a subsequent unnecessary payment of the debt already thus pro tanto extinguished by the assignment, or by a set-off available on settlement of other accounts between the parties; even if such facts had been established by the evidence.

The conclusion reached conflicts with the concurring opinion of Judge Sims but no authorities are therein cited for the proposition that the original consideration for an equitable assignment of a fund to be surrendered to the assignee at a future time must continue until the fund has been paid over or the assignment will be revocable by the assignor. No case has been found by the present writer specifically deciding the point but the inference from the cases discussed seems to be that the assignment once supported by consideration would be irrevocable.

C. E. S., JR.